

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED
MAY 17 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Request for

Declaratory Ruling Regarding
the Use of Section 252(i) To Opt Into
Provisions Containing Non-Cost-Based
Rates

CC Docket No. 99-143

ORIGINAL

OPPOSITION OF AT&T CORP.

David L. Lawson
James P. Young
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006
(202) 736-8000

Mark C. Rosenblum
Stephen C. Garavito
AT&T Corp.
Room 325G1
295 North Maple Avenue
Basking Ridge, N.J. 07920
(908) 221-8100

Attorneys for AT&T Corp.

May 17, 1999

No. of Copies rec'd _____
List ABCDE _____

047

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for)	
)	
Declaratory Ruling Regarding)	CC Docket No. 99-143
the Use of Section 252(i) To Opt Into)	
Provisions Containing Non-Cost-Based)	
Rates)	

OPPOSITION OF AT&T CORP.

Pursuant to the Commission's Public Notice, DA No. 99-862, dated May 6, 1999, AT&T Corp. ("AT&T") hereby submits this Opposition to GTE Service Corporation's ("GTE") Petition for Declaratory Ruling ("Petition"), filed April 13, 1999, seeking a modification of the Commission's rules implementing Section 252(i) of the Communications Act (47 U.S.C. § 252(i)).

Although the express terms of both Section 252(i) and Commission Rule 809 (47 C.F.R. § 51.809) permit a requesting carrier to "opt-in" to provisions of an incumbent's interconnection agreement with another requesting carrier, GTE acknowledges that it is flouting those requirements across the country by selectively refusing to allow opt-ins to reciprocal compensation provisions of its existing agreements. *See* Petition at 1, 3. Anticipating a series of Accelerated Docket complaints (*see* Petition at 3), GTE urges the Commission to validate this unlawful conduct by "clarifying" that GTE may disregard its obligations to a new requesting carrier under section 252(i) and Rule 809 whenever the agreement provision in question is "no longer cost-based" as between the incumbent and the *original* requesting carrier party to the agreement. Petition at 2.

The relief GTE seeks could not conceivably be accomplished through "clarification" of the Commission's existing rule, which properly focuses only on whether serving the *new* requesting carrier would impose materially greater costs on the incumbent as compared to serving the original carrier. GTE seeks a radically different approach, and its request should be denied. First, as the Petition makes clear, GTE's real concern is not with the Commission's pick-and-choose rule, but with the reciprocal compensation treatment of traffic bound to an Internet service provider ("ISP"). That issue is, of course, the subject of ongoing Commission and state commission proceedings to which GTE is a party, and it should be addressed directly in those proceedings. Second, the new rule GTE proposes -- which would invite GTE and other incumbents to block virtually *all* opt-in requests with expensive and protracted cost proceedings -- is unworkable and inconsistent with both the text and pro-competitive purposes of section 251(i) and Rule 809. Finally, GTE's related argument concerning symmetrical switching rates has already been considered and rejected by the Commission in *Local Competition Order* rulings which GTE fails even to cite.

1. Although nominally directed at the Commission's pick-and-choose rule, the Petition gives the statutory requirements and pro-competition policies underlying that rule little more than passing reference. Instead, the Petition is devoted almost entirely to GTE's oft-repeated, but never substantiated, claim that its existing interconnection agreements, many of which GTE voluntarily negotiated, are somehow "unfair," because, for purposes of inter-carrier compensation, those agreements treat ISP-bound traffic just like the local data and voice traffic from which it is indistinguishable for that purpose. That very issue is the subject of an ongoing Commission proceeding (and, as GTE points out, state commission proceedings as well). See *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and

Notice of Proposed Rulemaking (rel. February 26, 1999) ("*ISP-Bound Traffic Declaratory Ruling*" or "*ISP-Bound Traffic NPRM*"). As commenters have explained in the *ISP-Bound Traffic* proceeding, GTE's underlying ISP-bound traffic complaints are entirely without merit. For example, GTE's claim that its retail revenues are inadequate to cover its costs for residential customers that are heavy Internet users, *see* Petition at 5, is properly directed at the state commissions that regulate those rates (and is misplaced in any event because it ignores that retail rates are designed to cover GTE's costs of serving an *average* customer, not the highest cost customers). *See, e.g., ISP-Bound Traffic NPRM*, CC Docket Nos. 96-98 and 99-68, Comments of AT&T Corp., pp. 11-12 & n.12 (filed April 12, 1999). One thing is clear, however: the Commission should resolve ISP-bound traffic issues directly in its ISP-bound traffic proceeding, and not indirectly, as GTE proposes, through wholesale changes to the pick-and-choose rule.

Indeed, GTE struggles mightily to squeeze its ISP-bound traffic concerns into a pick-and-choose mold. Wholesale changes to the pick-and-choose rule are necessary, we are told, because some state commissions have misconstrued the reciprocal compensation provisions of some existing interconnection agreements.¹ This argument simply ignores the Commission's recent Declaratory Ruling, in which the Commission expressly declined to impose a generic view of interconnection agreement parties' contractual intents, reasoning that the state commissions are in the best position to interpret the agreements they have arbitrated and approved, and that pending adoption of a federal rule on ISP-bound traffic, state determinations should control. *See ISP-Bound Traffic Declaratory Ruling*, CC Docket Nos. 96-98 and 99-68, ¶ 21-27. Regardless of what rule the FCC ultimately

¹ GTE's own examples demonstrate that some state commissions have adopted GTE's position on these issues, and GTE continues to litigate the issue in other states. *See* Petition at 6-7 & n.11.

adopts in the ongoing *ISP-Bound Traffic* proceeding, the Commission certainly should not reverse field and attempt some sort of blunderbuss preemption of state law in the meantime by radically revising the pick-and-choose rule for all purposes merely to serve GTE's anticompetitive interest in preventing subsequent carriers from opting into inter-carrier compensation arrangements.

In all events, GTE's proposed "remedy" is both unnecessary and remarkably overbroad. In this regard, if, as GTE claims, state commissions have misread its agreements, GTE has a complete remedy through the Section 252(e)(6) appeal process.²

2. Even if GTE's proposed revision to the pick-and-choose rule were not transparently directed at GTE's narrow ISP-bound traffic interests, the proposal would have to be rejected as contrary to the core policies underlying section 252(i) and Rule 809. Section 252(i) broadly requires incumbents to make available to a requesting carrier "any" service provided under an interconnection agreement "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). As the Commission has noted, this "pick-and-choose" requirement is "a primary tool of the 1996 Act for preventing discrimination." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1296 (1996) ("*Local Competition Order*"). Accordingly, in response to incumbent LEC cost arguments, the Commission carved out only a narrow exception consistent with this nondiscrimination purpose -- an incumbent LEC can refuse an opt-in request only if it "proves to the state commission that the costs of providing a particular interconnection, service,

² Of course, where GTE insists on flouting the *Commission's* rules, carriers may, as GTE fears, file Accelerated Docket complaints with the FCC. But once the FCC makes clear -- either here, in the ISP proceeding, or in a complaint case -- that GTE must accommodate pick and choose requests absent the required showing that the requesting carrier is more costly to serve than the original carrier, GTE will presumably comply.

or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement." 47 C.F.R. § 51.809(b)(1).

Rule 809(b)(1) is fair to incumbents and entrants alike and is relatively easy to administer. The rule is fair because, while protecting similarly situated requesting carriers against discrimination, it ensures that an incumbent is not bound to more onerous terms than those it agreed to with the original carrier (or that were imposed as just, reasonable and cost-based by a state commission arbitrator). By focusing on *incremental* differences in the costs of serving two carriers, Rule 809(b)(1) also generally obviates any need (or, given the incumbents' anticompetitive incentives, opportunity) for expensive and protracted cost proceedings to determine *absolute* levels of costs. Rather, the incumbent must first demonstrate that it would have to do something *different* (and at greater cost), in serving the new carrier as opposed to serving the old carrier.

By contrast, GTE's proposed rule that it may deny any pick-and-choose request simply by showing its costs vis-a-vis the *original* carrier have changed would gut the pick and choose rule. GTE's proposed rule would effectively allow an incumbent to initiate a full blown cost proceeding every time a requesting carrier sought to invoke its Section 252(i) rights -- thus eviscerating one of the central purposes of Section 252(i), which seeks to capitalize on the administrative efficiencies of permitting a new entrant to benefit from contract terms already negotiated and arbitrated by others. As GTE has demonstrated by its refusal to comply with the Act's pick and choose requirements even in the absence of such a rule, there can be little doubt that GTE and other incumbents would abuse any such rule to impede competition with lengthy and expensive cost proceedings and appeals. The prospect of such litigation would, as a practical matter, render the pick-and-choose rule a nullity.

The ISP-bound traffic disputes that are the focus of GTE's Petition well illustrate the soundness of existing Rule 809 and the unsoundness of GTE's proposed modification. Under existing Rule 809, GTE's complaints about the inadequacy of its retail revenues are, appropriately, a non-starter. It costs GTE no more per minute to terminate calls originated by the new carrier than the original carrier; nor does GTE incur more costs per minute of GTE-originated traffic handed-off for delivery to the new carrier as compared to the original carrier (regardless whether the traffic in question is destined for an ISP). Under GTE's view, however, GTE should be allowed to decline an opt-in request by (and invoke a cost proceeding with) an identically-situated carrier simply by declaring that costs have changed over time. That is an extraordinary request that would excuse GTE from cost/price risk faced by all commercial actors who sign term agreements with ordinary "favored nations" provisions.³ Here, of course, that risk is already reasonably contained by the relatively short terms state commissions have approved for interconnection agreements.⁴

3. Finally, GTE's related proposal that requesting carriers "should not be allowed to opt into switching rates if they are not performing that type of switching" is a direct assault on the Commission's *Local Competition Order* and should be rejected. See Petition at 7-9. Indeed, GTE made precisely that argument in 1996 in the *Local Competition* proceeding, and the FCC expressly rejected it. The Commission's local competition rules generally require symmetrical rates and

³ There can be no serious claim of unfair surprise here -- GTE and other incumbents were fully aware that the terms of approved agreements would be available to other carriers that impose similar costs when the incumbents negotiated and arbitrated their existing agreements.

⁴ Further, AT&T has confirmed in the *ISP-Bound Traffic* proceeding that it would not object if the Commission were to make clear that the Commission's final rules governing ISP-bound traffic will provide a basis for incumbents to break the chain of pick-and-choose elections regarding such traffic when existing agreements expire. See *ISP-Bound Traffic NPRM*, CC Docket Nos. 96-98 and 99-68, Comments of AT&T Corp., p. 21 (filed April 12, 1999).

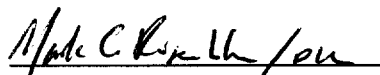
establish a presumption that such rates should be based on the incumbent's costs. That approach was appropriate, the Commission ruled, because it reduces an incumbent's ability to use its bargaining strength to negotiate high termination rates for itself and low rates for its competitors, avoids the need for small entrants to conduct forward-looking economic cost studies, and is administratively easy. *See Local Competition Order*, ¶¶ 1085-89. Further, the Commission specifically ruled, contrary to GTE's proposal, that "where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate." *Id.* at ¶ 1090. The Commission should therefore reject GTE's attempt to undo the *Local Competition Order* in the guise of an ill-considered modification to the pick-and-choose rule.

CONCLUSION

For the foregoing reasons, GTE's Petition for Declaratory Ruling should be denied.

Respectfully submitted,

David L. Lawson
James P. Young
Sidley & Austin
1722 Eye Street N.W.
Washington, D.C. 20006
(202) 736-8000

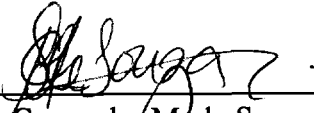

Mark C. Rosenblum
Stephen C. Garavito
AT&T Corp.
Room 325G1
295 North Maple Avenue
Basking Ridge, N.J. 07920
(908) 221-8100

Attorneys for AT&T Corp.

May 17, 1999

Certificate of Service

I, Cassandra M. de Souza, do hereby certify that I caused one copy of the foregoing Opposition of AT&T Corp. to be served by First Class mail on all parties on the attached service list, this 17th day of May, 1999.



Cassandra M. de Souza

SERVICE LIST

Magalie R. Salas
Office of the Secretary
FEDERAL COMMUNICATIONS
COMMISSION
445 12th Street, SW
Room
Washington, DC 20554

Janice Myles
Common Carrier Bureau
FEDERAL COMMUNICATIONS
COMMISSION
445 12th Street, SW
Room 5-C327
Washington, DC 20554

Gail L. Polivy
GTE SERVICE CORPORATION
1850 M Street, NW
Suite 1200
Washington, DC 20036

Thomas Parker
GTE SERVICE CORPORATION
600 Hidden Ridge
MS HQ-E03J43
P.O. Box 152092
Irving, TX 75015-2092

Gregory J. Vogt
Suzanne Yelen
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006

ITS, Inc.
1231 20th Street, NW
Washington, DC 20036